

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

SHAUNDA NECHELLE HOPE,

Defendant-Appellant.

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UNPUBLISHED

December 20, 2005

No. 257400

Wayne Circuit Court

LC No. 04-003315-01

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of armed robbery, MCL 750.529, assault with intent to do great bodily harm, MCL 750.84, felonious assault, MCL 750.82, and possession of a firearm while committing a felony, MCL 750.227b. Defendant was sentenced to 14 to 21 years in prison for the armed robbery conviction, one to ten years in prison for the assault with intent to do great bodily harm conviction, six months to four years in prison for the felonious assault conviction and two years in prison for the felony firearm conviction. We affirm but remand for resentencing to correct an error apparent on the record.

I

Defendant's convictions arise from the armed robbery of Damond Lewis on January 22, 2004. Testimony at trial indicated that Lewis and an acquaintance, Ronald Roberts, went to buy marijuana from defendant's brother, Dedrick Hope. Upon arriving at the residence, Dedrick immediately accused Lewis of robbing the mother of his child the previous night. Dedrick drew two guns, directing Roberts into the kitchen and Lewis into the living room. Dedrick threatened to kill Lewis and began beating him with both guns. Defendant's son, Andre, also beat Lewis while defendant watched. Defendant joined in, threatening to kill Lewis while holding one of Dedrick's guns. Defendant also searched Lewis' pockets, taking approximately \$100 and his "cap gun." She gave the money to her brother. Subsequently, Dedrick dragged Lewis toward the basement, ordering him to get in the basement so he could be tied up and killed. Lewis refused. Defendant hit him with her closed fist, and Dedrick placed a gun against Lewis' leg, pulling the trigger. After Dedrick left the house, Lewis and Roberts were allowed to leave. The police were contacted and defendant was arrested shortly thereafter. At trial, defendant denied any involvement. Under an aiding and abetting theory, defendant was convicted of armed robbery, assault with intent to do great bodily harm, felonious assault, and felony-firearm. The

trial court sentenced defendant to a minimum of 168 months in prison, three months below the recommended sentencing guidelines minimum of 171 months.<sup>1</sup> Defendant now appeals.

## II

Generally, the construction or application of statutory sentencing guidelines presents a question of law which is reviewed de novo. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). Appellate review of a sentence imposed under the statutory guidelines is limited to determining whether the sentence was imposed within the appropriate guidelines range and, if not, whether the departure from the range was based upon a substantial and compelling reason as articulated by the trial court. *People v Reincke (On Remand)*, 261 Mich App 264, 265; 680 NW2d 923 (2004). This Court reviews a trial court's factual findings at sentencing for clear error. *Mack, supra* at 125. The scoring of a sentencing guidelines variable is reviewed to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supported a particular score. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Generally, the admission of rebuttal evidence is reviewed for an abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). However, this Court reviews unpreserved evidentiary issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Because defendant did not raise her claim of ineffective assistance of counsel in a motion for new trial or request a hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. *People Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2000). Whether a defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). Questions of constitutional law are reviewed de novo. *Id.* A judge must first find the facts and then decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel. *Id.* A trial court's findings of fact are reviewed for clear error. *Id.*

This Court reviews claims of prosecutorial misconduct de novo to determine whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). This Court will not find error requiring reversal unless the prejudicial effect of the prosecutor's comments could not have been cured by a timely instruction. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

This Court reviews for an abuse of discretion whether a jury instruction is applicable to the facts of a case. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003). Jury

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<sup>1</sup> The trial court apparently inadvertently sentenced defendant below the sentencing guidelines minimum range of 171 months to 285 months. The sentencing transcript includes the trial court's statement that it would sentence defendant to 170 months or 14 years, which was "the lowest [the trial court could] go without some good reason."

instructions are reviewed in their entirety to determine whether error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). “Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *Id.*

### III

Defendant first challenges the scoring of offense variable (OV) 7 and OV 9 when calculating her minimum sentencing guidelines range. Generally, a sentence within the appropriate guidelines range is subject to review only if challenged at sentencing, in a motion for resentencing, or in a motion to remand, but a sentence outside the range may be challenged on appeal even if the issue is not so raised. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309, 310-311; 684 NW2d 669 (2004). Because defendant’s sentence is below the appropriate guidelines range (even if inadvertently) we will treat her sentence as being reviewable; however, defendant failed to preserve this issue by raising the issue at sentencing, in a motion for resentencing, or in a “proper motion” to remand.<sup>2</sup> MCL 769.34(10). Therefore, defendant must satisfy the plain error standard set forth in *Carines supra* at 763. See also *Kimble, supra* at 312.

Defendant first asserts that the record evidence does not support the trial court’s assessment of fifty points for OV 7. We disagree.

A defendant should be assessed 50 points under OV 7 when a “victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a). “As used in this section, ‘sadism’ means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification.” MCL 777.37(3).

Given defendant’s involvement, we find that there was evidence to support the trial court’s conclusion and, therefore, affirm its score of fifty points for OV 7. The evidence showed that defendant aimed the gun at Lewis and threatened to kill him, as he cried and pleaded for his life. Later, after Lewis was pushed down the stairs toward the basement, defendant followed, stating “[l]et me get a piece of him” before she struck him in the face with her closed fist, sufficiently hard enough to require stitches.

With regard to OV 9, the trial court must score ten points if it determines that two to nine victims were “placed in danger of injury or loss of life as a victim.” MCL 777.39(1). Defendant asserts that there was only one robbery victim, Lewis, so it was error to assess ten points for two victims. We disagree. In *People v Morson*, 471 Mich 248, 261-262; 685 NW2d 203 (2004), the Michigan Supreme Court determined that although only one person was robbed, a bystander who was placed in danger of injury was properly considered a victim. Here, defendant was assessed ten points for OV 9 because there were two victims, Lewis and Roberts. The record adequately supports the finding that Roberts was a victim along with Lewis because they were both placed

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<sup>2</sup> Defendant filed a motion to remand for resentencing; however, this Court denied the motion as untimely. *People v Hope*, unpublished order of the Court of Appeals, entered June 21, 2005 (Docket No. 257400).

in danger. Dedrick pointed a gun at Roberts and forced him into the kitchen. When Lewis was shot, Roberts was sitting just a few feet away. Therefore, the trial court properly assessed ten points for OV 9. Defendant has not established the trial court's calculation of her minimum sentencing guidelines range was plain error.

Defendant next argues that the trial court abused its discretion when it allowed Lewis to be recalled as a rebuttal witness. Because defendant did not object at trial to Lewis being called as a rebuttal witness and did not object to his rebuttal testimony when given, this issue is unpreserved. *People v Rice*, 235 Mich App 429, 442; 597 NW2d 843 (1999).

Rebuttal testimony may be used to contradict, repel, explain, or disprove evidence presented by the other party in an attempt to weaken and impeach it. *People v Pesquera*, 244 Mich App 305, 314; 625 NW2d 407 (2001). "The test for error regarding rebuttal evidence is whether it is justified by the evidence it is offered to rebut." *Rice, supra* at 442. The question whether rebuttal evidence was properly admitted depends on what proofs the defendant introduced and whether the rebuttal evidence is properly responsive to evidence introduced or a theory developed by the defendant. *Figures, supra* at 399. "As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief." *Id.*

Here, assuming but not deciding that the admission of Lewis' rebuttal testimony was improper and not responsive to evidence presented by defendant, and therefore plain error, nonetheless, reversal is not warranted because admission of the rebuttal evidence was not outcome-determinative. Lewis' rebuttal testimony was brief and dealt solely with the cap gun. Defendant's actions with respect to the cap gun were not used as evidence to prove any element of the charged crimes. The prosecutor briefly mentioned Lewis' gun during rebuttal argument, but stated that "[i]t wasn't an issue, it's not an issue and it is not something that should be examined or analyzed when you're back in the jury room." In addition, because the evidence against defendant was overwhelming, the evidence did not affect the jury's verdict.

Defendant next claims that she received ineffective assistance of counsel because defense counsel failed to object to the aiding and abetting jury instruction and failed to object to the standard jury instruction for specific intent. Defendant contends that the jury was allowed to, first, convict without determining if defendant actually encouraged or assisted with the offenses and, second, speculate about the required intent because it also received a specific intent instruction. We disagree.

We presume that trial counsel rendered effective assistance to the defendant, and the defendant bears a heavy burden of demonstrating that his counsel was ineffective. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). To meet this burden, a defendant must demonstrate that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment . . . [and] that the deficient performance prejudiced the defense," to the extent that the defendant was deprived of a fair trial with a reliable result. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002), quoting *People v Mitchell*, 454 Mich 145, 155-156; 560 NW2d 600 (1997), quoting *Strickland v Washington*, 466 US 668; 104 S Ct 2052, 80 L Ed 2d 674 (1984).

Defendant fails to specify how the aiding and abetting instruction allowed the jury to speculate about defendant's intent. In any event, the jury instructions were not defective. The trial court read the standard jury instruction for specific intent, CJI 2d 3.9, and accurately stated the requirement that the prosecutor prove that defendant did something to assist in the commission of the crime. Because the jury instructions accurately stated the law, any objection would have been futile. The failure to assert a meritless objection does not constitute ineffective assistance of counsel. *Matuszak, supra* at 58.

Next, defendant presents a mixed issue of ineffective assistance of counsel and prosecutorial misconduct. She contends that defense counsel was ineffective because he failed to object to remarks made by the prosecutor that improperly presented the prosecutor's personal belief in defendant's guilt.

Defendant's claim is without merit. Reviewing the remarks in context, we conclude that the prosecutor was not offering her personal opinion that defendant was guilty, and instead, commenting that the prosecution had met its burden to present sufficient evidence to support each element of the charged crimes beyond a reasonable doubt. While a prosecutor may not argue that jurors should convict a defendant as part of their civic duty, *Id.* at 56, the remarks did not constitute an assertion that the jury should convict defendant regardless of the evidence.

Nor does the record support defendant's final claim that the prosecutor improperly vouched for Lewis' and Roberts' veracity. Prosecutorial vouching occurs when a prosecutor makes personal assurances of witness credibility or claims to have information that the jury is unaware of, which gives credibility to a witness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). A prosecutor may not vouch for the credibility of his witnesses by expressing a personal opinion about the witness' truthfulness or by implying that he has some special knowledge of that truthfulness. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). However, a prosecutor may comment on his own witness' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes. *Id.*

Considered in context, the prosecutor was not implying that she had special knowledge or personal knowledge of the witnesses' truthfulness. Because a prosecutor's comments must be considered in light of the defense arguments, *People v Knowles*, 256 Mich App 53, 61; 662 NW2d 824 (2003), and the record shows defendant argued that Lewis and Roberts were lying about what had happened, we conclude the prosecutor's remarks were properly responsive to defendant's theory of the case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000) (otherwise improper prosecutorial remarks generally do not require reversal if they address issues raised by defense counsel).

Accordingly, defendant's claims of ineffective counsel fail. Because the prosecutor's comments were not improper, defense counsel was not ineffective for failing to object. *Matuszak, supra*. Defendant has not shown she is entitled to a new trial.

We remand for imposition of a sentence within the appropriate sentencing guidelines

range, or articulation on the record a substantial and compelling reason for departing from the sentencing guidelines range. We affirm in all other respects. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder